93-630

No.

U.S.
D
OCT 21 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, HOUSTON LAWYERS' ASSOCIATION, JESSE OLIVER, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

ELAINE R. JONES
DIRECTOR-COUNSEL
THEODORE M. SHAW
NORMAN J. CHACHKIN
*CHARLES STEPHEN RALSTON
GAILON W. MCGOWEN, JR.
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street
Sixteenth Floor
New York, N.Y. 10013
(212) 219-1900

SHERRILYN A. IFILL
University of Maryland
School of Law
500 W. Baltimore
Baltimore, MD 21201
(410) 706-8391

E. BRICE CUNNINGHAM
777 S. R.L. Thornton Frwy.
Suite 121
Dallas, TX 75203
(214) 428-3793

GABRIELLE K. MCDONALD
Walker & Satterthwaite
7800 N. Mopac
Suite 215
Austin, Texas 78759
(512) 346-6801

WILLIAM L. GARRETT
BRENDA HULL THOMPSON
8300 Douglas, Suite 800
Dallas, TX 75225
(214) 369-1952

ROLANDO L. RIOS
Milam Building, Suite 1024
115 E. Travis Street
San Antonio, TX 78205
(512) 222-2102

EDWARD B. CLOUTMAN, III
Mullinax, Wells, Baab
& Cloutman, P.C.
3301 Elm St.
Dallas, TX 75226
(214) 939-9222

*Counsel of Record

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

35 pp

QUESTIONS PRESENTED

1. In cases brought under Section 2 of the Voting Rights Act of 1965 involving judicial elections, is a court of appeals authorized to depart from the analytical framework established by this Court's authoritative construction of the statute in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and applied to the case at bar in *Houston Lawyers' Association v. Attorney General*, 501 U.S. ___, 115 L.Ed. 2d 379 (1991)?

2. Should the Court grant certiorari to resolve a conflict between the ruling below and the decision of the Eleventh Circuit in *Nipper v. Smith*, 1 F.3d 1171 (1993) as to the appropriate tests for determining vote dilution and for measuring minority-candidate electoral success in judicial elections cases?

3. Was the Fifth Circuit's refusal to remand this case to the district court for a hearing on a proposed settlement agreed to by the plaintiffs and the Governor, Lieutenant Governor, Secretary of State, Attorney General, and Legislature of the State of Texas, because of the opposition to the settlement by another state official defendant and by two intervenor-defendants, such a departure from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's power of supervision?

4. Did the Court below fail to execute the mandate of this Court in *Houston Lawyers' Association v. Attorney General* when it refused to remand the case to the district court for an initial determination of whether Texas had a substantial interest in maintaining an at-large system of electing trial court judges?

PARTIES

The participants in the proceedings below were:

League of United Latin American Citizens (LULAC) Local Council 4434, LULAC Local Council 4451, LULAC (Statewide), Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer, Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Judge Mary Ellen Hicks, Rev. James Thomas, *Plaintiffs;*

The Houston Lawyers' Association, Weldon Berry, Alice Bonner, Rev. William Lawson, Bennie McGinty, Deloyd Parker, Francis Williams, *Plaintiff-Intervenors;*

Jesse Oliver, Fred Tinsley and Joan Winn White, *Plaintiff-Intervenors;*

Dan Morales, in his capacity as Attorney General of the State of Texas; John Hannah, in his capacity as Secretary of State of Texas; Thomas R. Phillips, Mike McCormick, Pat McDowell, Thomas J. Stovall, B. B. Schraub, Leslie Murray, Darrell Hester, William E. Moody, Weldon Kirk, Jeff Ealker, Ray D. Anderson, Joe Spurlock II, and Leonard E. Davis, in their capacities as members of the Texas Judicial Districts Board; *Defendants;*

Judge Sharolyn Wood and Judge Harold Entz, *Defendant-Intervenors.*

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

The Proceedings Below 3

1. *The District Court's Decision After Trial* 4

2. *The First Series of Fifth Circuit Rulings* 5

3. *This Court's Prior Decision In This Case* 6

4. *The Second Series of Fifth Circuit Rulings* 6

5. *The Decision Below* 7

Statement of Facts 9

REASONS FOR GRANTING THE WRIT 12

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CLEAR HOLDINGS IN *THORNBURG V. GINGLES* AND *HLA V. ATTORNEY GENERAL OF TEXAS* 12

II. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH THE DECISION OF THE ELEVENTH CIRCUIT IN *NIPPER V. SMITH* AS TO THE APPROPRIATE TEST FOR DETERMINING VOTE DILUTION IN JUDICIAL ELECTIONS CASES 19

III. THE COURT OF APPEALS' HOLDING THAT THE DEFENDANT OFFICIALS OF THE STATE OF TEXAS COULD NOT ENTER INTO A PROPOSED SETTLEMENT OF THIS CASE PRESENTS AN IMPORTANT ISSUE THAT SHOULD BE RESOLVED BY THIS COURT 22

IV. THE FIFTH CIRCUIT FAILED TO ADHERE TO THIS COURT'S MANDATE WHEN IT DID NOT REMAND THE CASE TO THE DISTRICT COURT FOR A DETERMINATION OF THE FACTUAL ISSUE OF THE WEIGHT TO BE GIVEN TO THE STATE'S INTEREST IN AT-LARGE ELECTION OF TRIAL COURT JUDGES. 25

CONCLUSION 27

TABLE OF AUTHORITIES

Cases: *Pages:*

Burns v. Richardson, 384 U.S. 73 (1966) 16

Evans v. Jeff D., 475 U.S. 717 (1986) 22

Ex Parte Young, 209 U.S. 123 (1908) 24

Houston Lawyers Association v. Attorney General of Texas, 501 U. S. ___,

115 L.Ed. 2d 379 (1991) . . . . . *passim*

Local Number 93, International Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986) 23

LULAC v. Clements, 914 F.2d 620 (5th Cir. 1990) 2

Marek v. Chesny, 473 U.S. 1 (1985) 23

Nipper v. Smith, 1 F.3d 1171 (11th Cir. 1993) . . 19-21, 26

Nipper v. U-Haul Co., 516 S. W. 2d 467, 470 (Tex. Civ. App. 1974) 10, 27

Rogers v. Lodge, 458 U.S. 613 (1982) 16

Rufo v. Inmates of Suffolk Jail, 502 U.S. ___, 116 L.Ed.2d 867 (1992) 23

Thornburg v. Gingles, 478 U. S. 30 (1986) . . . . . *passim*

Whitcomb v. Chavis, 403 U.S. 124 (1971) 16

White v. Regester, 412 U.S. 755 (1973) 16

Wise v. Lipscomb, 437 U.S. 535 (1978) 23

Zimmer v. McKeithen, 485 F.2d 1297

(5th Cir. 1973) 13, 16

Pages:

Statutes: *Pages:*

28 U.S.C. § 1254(l) 2

42 U.S.C. 1973b 3

42 U.S.C. § 1973 2

Section 2 of the Voting Rights Act, as amended . . *passim*

Section 4 of the Voting Rights Act, as amended 3

Tex. Civ. Prac. & Rem. Code, Ch. 15 10

Tex. Const., Art. 5, §7 . . . . . 9, 10

Tex. Const., Art. 5, §8 9

Tex. Const., Art. 5, §28 10

Tex. Elec. Code §2.001 10

Tex. Elec. Code §172.003 10

Tex. Govt. Code §24.101 9

Tex. Govt. Code §24.174. 9

Tex. Govt. Code, §24.001 10

Other Authorities: *Pages:*

1982 U. S. Code Cong. & Admin. News 177 4

McDuff, *Judicial Elections and the Voting Rights Act*, 38 LOY. L. REV. 931 (1993) 27

Senate Report, No 97-417, 97th Congress 2d Sess. 4, 14, 16

No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, THE HOUSTON LAWYERS' ASSOCIATION, JESSE OLIVER, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, League of United Latin American Citizens (LULAC) Local Council 4434, LULAC Local Council 4451, LULAC (Statewide), Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer, Sr. Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Judge Mary Ellen Hicks, Rev. James Thomas, The Houston Lawyers' Association (HLA), Weldon Berry, Alice Bonner, Rev. William Lawson, Bennie McGinty, Deloyd Parker, Francis Williams, Jesse Oliver, Fred Tinsley and Joan Winn White, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding August 23, 1993.

OPINIONS BELOW

The opinion of the Fifth Circuit *en banc* is reported at 999 F.2d 831, and is set out at pp. 1a-202a of the Appendix hereto ("App."). The panel decision rendered after the remand of the case from this Court is reported at 986 F.2d 728 and is set out at App. at 203a-486a. The opinion of the United States District Court for the Western District of Texas is not reported and is set out at App. at 487a-549a, except for statistical tables that are an appendix to the district court's opinion. Copies of those tables have been filed under separate cover with the Clerk of the Court.

JURISDICTION

The decision of the Fifth Circuit was entered on August 23, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTE INVOLVED

This case involves Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, which provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by a State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . .
>
> (b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in

> the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

This case also involves Section 4 of the Voting Rights Act, as amended, 42 U.S.C. 1973b, which provides in pertinent part:

> (f)(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

STATEMENT OF THE CASE

The Proceedings Below

This is a voting rights case brought by African American and Hispanic citizens and organizations within the state of Texas, challenging under the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, the county-wide election of state district judges in nine metropolitan counties (Harris, Dallas, Bexar, Tarrant, Travis, Lubbock, Midland, Ector and Jefferson) in Texas. Suit was filed on July 11, 1988, in the U. S. District Court for the Western District of Texas against various state officials in their official capacities as surrogates for the real party in interest, the State of Texas.

1. *The District Court's Decision After Trial*

On November 9, 1989, the district court found a violation of the Voting Rights Act in all challenged counties. (App. at 487a-549a). The district court entered findings of fact, favorable to the plaintiffs, for each county on the three threshold factors identified by this Court in *Thornburg v. Gingles*, 478 U. S. 30 (1986):

- the minority group was sufficiently concentrated so as to constitute a voting age majority in a single member district, (App. at 497a-501a), and
- the minority group voted cohesively (App. at 501a-533a), and
- a white voting bloc usually defeated the choice of the minority voters. (App. at 501a-533a)

As required, the district court made findings regarding the "typical factors" indicating the existence of vote dilution, (App. at 533a-538a) as discussed in the Senate Report, No 97-417, 97th Congress 2d Sess., reprinted in 1982 U. S. Code Cong. & Admin. News at pp. 177 *et seq.*, that is a part of the legislative history of the 1982 amendments to the Voting Rights Act.[1]

The trial court found that there was a history of discrimination that touched upon minority access to the political system (App. at 533a-534a); that there was a numbered post system that enhanced the discriminatory effect of at-large voting (App. at 534a-535a); that five of the nine counties were so large as to enhance the difficulty of minority candidates running at large, (App. at 534a-535a);

---

[1]This Court has characterized the Senate Report as an "authoritative source" for interpreting amended Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7. (1986).

and that there had been racial appeals in two recent races in Dallas County. (App. at 535a). In addition, the court found that there was a persistent lack of electoral success of minority candidates for judicial offices. (App. at 536a-537a). Plaintiffs did not raise the issue of lack of responsiveness of elected officials.

Plaintiffs charged that the reasons for the use of at-large elections were tenuous. Although the court found that the reasons offered by the State of Texas for the maintenance of the at-large system of elections were not pretextual, they also were not compelling. (App. at 537a-538a).

Finally, based upon the "totality of the circumstances," the trial court found that minority voting strength was diluted in each of the targeted counties. (App. at 545a-546a).

2. *The First Series of Fifth Circuit Rulings*

Defendants and Defendant-Intervenors appealed to the United States Court of Appeals for the Fifth Circuit. On May 11, 1990, that court reversed the district court, holding 2-1 that trial judges elected at large in multi-member districts nevertheless occupy single-member offices that are incapable of being further sub-divided and to which Section 2 principles have no application. 902 F. 2d 293 (5th Cir. 1990). Four days later, pursuant to a majority vote of the active judges *sua sponte*, a rehearing *en banc* was ordered, 902 F. 2d 322, and on September 28, 1990, the *en banc* court reversed the trial court in a severely split opinion. 914 F. 2d 620 (5th Cir. 1990).

The majority opinion held that the amended Section 2 of the Voting Rights Act, which incorporates a "results test," does not apply to judicial elections, regardless of how discriminatory the system may be.

3. *This Court's Prior Decision In This Case*

This Court granted certiorari, 498 U.S. 1060 (1991), and reversed, holding that the Voting Rights Act does apply to state judicial election systems. The case was remanded for further proceedings consistent with this Court's opinion. *Houston Lawyers Association v. Attorney General of Texas*, 501 U. S. ___, 115 L.Ed. 2d 379 (1991).

4. *The Second Series of Fifth Circuit Rulings*

Upon return of the case to the Fifth Circuit, plaintiffs moved to remand the case to the District Court for further fact finding in light of this Court's decision. Instead, the court ordered further argument and the original panel affirmed the district court opinion in eight of the nine challenged counties. *LULAC v. Clements*, 986 F. 2d 728 (5th Cir. 1993)(App. at 203a-486a). Within a few days, *sua sponte*, the Fifth Circuit voted to hear the case *en banc*. 986 F. 2d 874 (5th Cir. 1993)(App. at 486a).

After the panel opinion was issued, the Attorney General and Secretary of State of Texas, named defendants in this action, joined by the Governor and Lieutenant Governor, and with the approval of a majority of the Texas House of Representatives and a majority of the state Senate, which voted as the Committee of the Whole, entered into a settlement agreement with all of the Plaintiffs and Plaintiff-Intervenors. Under the agreement, judicial elections in the nine counties would be held under a sub-districting plan, with some at-large elections retained in Dallas and Harris Counties. The settlement was not joined by Defendant-Intervenors Wood and Entz[2], or by the Defendant members of the Texas Judicial Districts Board.

---

[2] State district judges Wood and Entz had intervened in their personal capacities only.

A joint motion was filed by the plaintiffs and the state officials with the Fifth Circuit requesting that the case be remanded to the District Court for a hearing and findings on the proposed settlement. Chief Justice Phillips, in his capacity as chair of the Judicial Districts Board, and intervenor judges Wood and Entz opposed this motion.

On August 23, 1993, the *en banc* court, 9-4, denied the request to remand, reversed the district court's opinion, and held that there was no violation of the Voting Rights Act in any of the nine targeted counties. 999 F.2d 831 (5th Cir. 1993)(App. at 1a-202a).

5. *The Decision Below*

The majority opinion held that:

a. Texas' Governor, Lieutenant Governor, Secretary of State, and Attorney General, and a majority of its legislators in both houses, could not enter into a settlement of this litigation over the objection of one defendant (chair of the Texas State Judicial Districts Board), who had been sued in his official capacity only, and of two defendant-intervenors who entered the case in their personal capacities only.[3] In addition, according to the majority, once certain "legal errors" of the district court were corrected, there was nothing to settle. (App. at 10a-25a.)

b. Plaintiffs failed to establish the threshold factor of "racial bloc voting" in this case because only one major party nominated minority-race candidates supported by minority

---

[3] Under the settlement agreement, the judicial positions occupied by Defendant-Intervenors Wood and Entz would continue to be elected county-wide as they were before the suit was brought. *See supra* note 2 (Wood and Entz intervened in personal capacities only).

voters. Although white voters refused to support minority-race candidates favored by minority voters — and only voted for minority-race candidates who lacked support from minority voters — this pattern was thus the result of partisan politics and not racial bloc voting, which the court defined as a voting pattern caused by a "built-in bias" among white voters. (App. at 38a-39a.)

c. The extremely low rate of electoral success by minority candidates for judicial office in the nine challenged counties was not probative of discrimination, whatever the minority population in these counties, because of the assertedly small number of minority lawyers in these jurisdictions. (App. at 62a-64a.)

d. Notwithstanding the undisputed existence of pervasive discrimination in the past and no matter how small the electoral success of minority candidates may be, in order to establish a violation of Section 2 plaintiffs must prove that the continuing effects of that discrimination currently prevent racial minority citizens from fielding candidates and running campaigns. (App. at 64a-68a).

e. The extent of the state's interest in maintaining at-large judicial elections is a question of law as to which an appellate court may make a *de novo* determination (App. at 74a-76a); instead of being considered as but one of many factors in determining whether there has been vote dilution, the state's alleged interest in having the electoral district and territorial jurisdiction of its district judges coterminous is so weighty that a Section 2 violation can be found only upon a very substantial showing of vote dilution (App. at 69a).

There were three dissenting opinions. Chief Judge Politz (App. at 130a-134a), asserted that since the real party in interest in this matter is the State of Texas, the Attorney General had the authority to settle on behalf of the state, despite the opposition of some elected state officials. (App.

at 132a). Judge Wiener, both concurring with Judge Politz and writing separately, maintained that the case should have been remanded for consideration of the settlement agreement. (App. at 202a).

The opinion by Judge King also favored a remand for a hearing on the proposed settlement. (App. at 135a-202a.)[4] In addition, this dissent asserted that the majority opinion rewrote the law as declared by this Court in requiring plaintiffs to negate partisan politics as a possible explanation for minority candidates' defeat at the polls, and essentially required plaintiffs to prove racial *animus* in the electorate in order to meet that burden. (App. at 137a-138a).

Statement of Facts

Texas district courts are the state's trial courts of general jurisdiction. *Texas Const.*, Art. 5, §8. District courts are created by statute, *Tex. Govt. Code* §24.101 ff. Each court, or judicial district, at issue in this case encompasses an entire county, with the exception of the 72nd Judicial District, which covers two counties. *Tex. Govt. Code* §24.174.[5]

Elections for judges are staggered, and are held every four years for each of the courts on a county-wide basis in

---

[4]Judge King's dissent incorporates by reference (App. at 136a, n.1) her decision for the panel majority. See App. at 203a-375a.

[5] Art. 5, §7a(i) of the Texas Constitution requires that judicial districts be no smaller than a county unless authorized by a majority of the voters in the county. To date, this mechanism has not been utilized.

partisan elections. Each candidate must file for a specific court, or numbered post. Party primaries have a majority-vote requirement, *Tex. Elec. Code* §172.003, but in the general election, a plurality of the votes determines the winner. *Tex. Elec. Code* §2.001. Vacancies are filled by gubernatorial appointment, *Tex. Const.*, Art. 5, §28.

Qualifications for office are set by the state constitution, *Tex. Const.*, Art. 5, §7, and by statute, *Tex. Govt. Code*, §24.001 ff.

Although a district judge usually sits in the county from which he/she is elected, the jurisdiction of every district court is statewide. *Nipper v. U-Haul Co.*, 516 S. W. 2d 467, 470 (Tex. Civ. App. 1974). Venue, on the other hand, is governed by a complex set of statutes. *Tex. Civ. Prac. & Rem. Code*, Ch. 15.

Minority electoral success for judicial offices has been minimal. A review of the targeted counties reveals the following:

County	No. of Judges	No. of Minority Judges	Total Pop.	Percent Minority[6]
Harris	59	3 (5%)	2,409,544	19.7%
Dallas	37	2 (5%)	1,556,549	18.5%
Tarrant	23	2 (9%)	860,880	11.8%
Bexar	19	5 (26%)	988,800	46.6%

[6]"No. of Minority Judges" and "Percent Minority" here refer only to the ethnic or racial group, *i.e.*, African Americans or Hispanics, on whose behalf a case was presented to the district court for the particular county.

County	No. of Judges	No. of Minority Judges	Total Pop.	Percent Minority
Travis	13	0 (0%)	419,335	17.2%
Jefferson	8	0 (0%)	250,938	28.2%
Lubbock	6	0 (0%)	211,651	27.1%
Ector	4	0 (0%)	115,374	25.9%
Midland	3	0 (0%)	82,636	23.5%

Perhaps more revealing of the lack of minority access is the fact that in Harris County only two Blacks had defeated whites in seventeen contested judicial elections. In Dallas County, no Black candidate supported by Black voters won. Bexar County results revealed that only one Hispanic had been victorious over a white in six contests. In the other targeted counties, no minority had ever won. In Jefferson, Lubbock, Ector and Midland counties, no minority had ever run. (App. at 501a-533a).

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CLEAR HOLDINGS IN *THORNBURG V. GINGLES* AND *HLA V. ATTORNEY GENERAL OF TEXAS*

The Fifth Circuit's decision in this case nullifies the plain holding of this Court in *Houston Lawyers' Association v. Attorney General of Texas*[7] (*HLA*): there is no single-person office exception that excludes elections for trial judges from Section 2 coverage. Having abandoned its argument that single person offices such as trial judges are *statutorily* exempted from Section 2, the Fifth Circuit instead creates a new test for determining vote dilution in judicial elections cases that *functionally* exempts those offices from Section 2 coverage. This new test for vote dilution has several distinctive features that conflict with this Court's opinions in *HLA* and *Thornburg v. Gingles*, 478 U.S. 30 (1986).

First, the Fifth Circuit's more stringent vote dilution test imposes a higher standard of proof on plaintiffs in proving that at-large elections violate Section 2. Second, the Fifth Circuit holds that the weight to be afforded the state's interest in the dilution analysis is a matter of law, not an issue of fact. Both these holdings contradict this Court's clear elaboration of the results test set out in *Thornburg v. Gingles*, and this Court's decision in *HLA*, that the "results" test (as explicated in *Gingles*) is applicable to cases challenging judicial elections.

The results test for assessing vote dilution claims was established by Congress in the Senate Report that

---

[7]501 U.S. ___, 115 L.Ed. 2d 379 (1991).

accompanied the 1982 amendments to Section 2.[8] In the Senate Report, Congress describes the proof required for plaintiffs to establish a violation of Section 2, and enumerates a list of factors which, if proven by plaintiffs, typically indicate the existence of racial vote dilution.[9]

---

[8]*See supra* note 1.

[9]The Senate Report factors are a modified version of the factors set out by the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973).

The typical factors identified by Congress include:

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction."

"Additional factors that in some cases have had probative

This Court in *Thornburg v. Gingles, supra,* adopted the standards identified by Congress for assessing Section 2 vote dilution claims. In particular, the *Gingles* defines the plaintiffs' burden of proof in Section 2 challenges to multimember or at-large elections: Plaintiffs must first prove the existence of three threshold matters: (1) that the minority group is sufficiently numerous and geographically compact to constitute a majority of a fairly drawn single-member district; (2) that the minority group is politically cohesive and (3) that the white majority votes sufficiently as a bloc to enable it to defeat the candidates of choice of minority voters, absent special circumstances. 478 U.S. 50-51. Once plaintiffs have made this showing, *Gingles* explains, minority plaintiffs may provide evidence of any of the nine Senate Report Factors, which tend to prove the existence of racial vote dilution. Proof of these factors is "supportive of, but *not essential* to, a minority voter's claim." 478 U.S. at 48-49, n.15 (emphasis in original). Moreover, failure "to establish any particular factor, is not rebuttal evidence of non-dilution." S. Rep. at 29 n.118.

The *Gingles* standard applies to claims challenging the at-large election of trial court judges. In *HLA, supra,* this

---

value as part of plaintiffs' evidence to establish a violation include:

> "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

S. Rep. No. 97-417, 97th Cong., 2nd Sess. (1982) at 28-29.

Court unequivocally held that the election of trial court judges is covered by Section 2 of the Voting Rights Act of 1965, as amended, and that the "results" test is the appropriate test for determining claims challenging judicial elections under Section 2. 115 L.Ed. 2d at 388.

The court below refused to apply *Gingles* to the judicial elections at issue in this case. Instead, in reviewing the district court's finding of vote dilution in judicial elections in Texas, the Fifth Circuit fashioned a new vote dilution analysis for judicial elections in which the "state's interest" in continuing to use at-large elections is balanced against plaintiffs' proof of vote dilution. App. at 85a-86a. Under this analysis, the plaintiffs' burden is to prove that the existing racial vote dilution in the jurisdiction is "substantial enough to override the state's . . . interest." App. at 86a. This standard is directly at odds with this Court's description of the plaintiffs' burden of proof in *Gingles* and with the statutory requirements enacted by Congress.

This Court has never accorded the state's interest primary or controlling weight among the various factors to be considered by courts in assessing vote dilution claims under Section 2. Indeed, only two years ago in *HLA*, this Court instructed the appellate court on remand that the state's interest "is *merely one factor* to be considered in evaluating the 'totality of circumstances.'" 115 L.Ed. 2d at 387 (emphasis added). Rather than follow this Court's clear instructions as to the role of the state's interest, the court below decided that the state's interest is a primary or outcome-determinative factor in a Section 2 case. App. at 85a-86a.

According controlling weight to any one factor in the dilution analysis, and to the "state's interest" in

maintaining the use of at-large elections in particular, is at odds with *Gingles*' admonition that no specific factor or group of factors must be proved in order for plaintiffs' to prevail,[10] 478 U.S. at 49 n.15, and with this Court's acknowledgment that at-large elections, while not *per se* violative of the Act, tend to minimize or cancel out minority voting strength. *See* 478 U.S. at 47-48, citing *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *White v. Regester*, 412 U.S. 755, 765 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971); and *Burns v. Richardson*, 384 U.S. 73, 88 (1966). In essence, the Fifth Circuit has transformed the ninth Senate Report factor — "whether the policy underlying the state or political subdivision's use of [the challenged voting practice] is tenuous" — into an immunizing shield for States.[11] In *HLA*, this Court acknowledged that "[a] State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry." 115 L.Ed. 2d at 387. But in rejecting the notion that single-person offices were exempt

---

[10]While proof of the existence of the Senate Report factors are not essential to a minority voters' claim, 478 U.S. at 49 n.15, this Court has held that the three *Gingles* preconditions must be established to prove that a multimember district impairs minority voting strength. 478 U.S. at 50.

[11]The elevation of the "state's interest" factor in the dilution analysis is particularly unwarranted because this factor, along "with whether elected officials are responsive to the needs of minorities," was reduced by Congress from among the primary factors listed to an optional part of the plaintiffs' case. See S. Rep. at 29. Prior to Congress' amendment of the statute, "the state's interest" and the "responsiveness" factors were listed equally among the other *Zimmer* factors. *Compare Zimmer*, 485 F.2d at 1305, *with* S. Rep. at 28-29.

from Section 2, this Court specifically cautioned against giving the state's interest controlling weight in the analysis.[12]

In fact, this Court in *Gingles* decided that the two Senate Report factors which are most probative of racial vote dilution are proof of racially polarized voting and the extent to which minority voters are able to elect their candidates of choice. 478 U.S. at 48-49 n.15. The Fifth Circuit rejected this Court's directions and instead instructed that "proof of racial appeals in elections, non-responsiveness of elected officials to minority voters and persistent lack of electoral success by minority candidates are most important." App. at 86a.

Finally, the Fifth Circuit's holding that the weight of the State's interests in using at-large elections "is a question of law for this court to determine de novo and not a question of fact" (App. at 76a), runs squarely counter to this Court's holdings in *Gingles* that "the

---

[12]This Court also rejected the notion that the multiple trial judges elected from the counties at issue in this lawsuit are, in fact, single-person offices. Instead this Court described the system of electing district judges as the archetypal at-large, numbered-post election system. Each of the district judges at issue in this suit is

> elected by the voters in the district in which he or she sits pursuant to an at-large, district-wide electoral scheme . . . . Although several judicial candidates in the same district may be running in the same election, each runs for a separately numbered position. Thus, for example, if there are 25 vacancies in the Harris County district in a particular year, there are 25 district-wide races for 25 separately numbered positions.

HLA, 115 L.Ed. 2d at 384.

ultimate finding of vote dilution" is a question of fact, subject upon review to the clearly erroneous test, 478 U.S. at 79, and that the "subsidiary issues" to a finding of vote dilution are also subject to the clearly erroneous standard. 478 U.S. at 78.

The district court in this case followed the *Gingles* analysis in reaching its conclusion that the judicial elections at issue violate Section 2. In its 94-page opinion, the district court engaged in a fact-intensive "'searching practical evaluation'" of the political reality facing minority voters in the nine counties at issue. *Gingles*, 478 U.S. at 79. Its conclusion that the countywide election system for district judges dilutes the voting strength of African American and Hispanic voters[13] was based on the plaintiffs' proof of the three *Gingles* threshold factors, and proof of several of the Senate Report factors. The Court of Appeals ignored the findings of the district court, yet never asserted that those findings were clearly erroneous. Instead, the Court of Appeals made its own factual findings with regard to the State's interest and declared that these were matters of law to be determined *de novo* by the appellate court. This approach to review of vote dilution cases conflicts with this Court's admonition in *Gingles* that appellate courts must defer to the "trial court's particular familiarity with the indigenous political reality," 478 U.S. at 79, and warrants review of the decision below.

---

[13]The district court's findings as to the existence of vote dilution in Harris and Dallas counties was limited to African Americans, as no claim on behalf of Hispanic voters was advanced by the plaintiffs in those two counties.

II.
THE FIFTH CIRCUIT'S RULING CONFLICTS WITH THE DECISION OF THE ELEVENTH CIRCUIT IN *NIPPER V. SMITH* AS TO THE APPROPRIATE TEST FOR DETERMINING VOTE DILUTION IN JUDICIAL ELECTIONS CASES

In the recent case of *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993), the Eleventh Circuit held that in judicial election cases, races in which only white candidates ran are not properly considered in determining whether racial bloc voting exists if racially polarized voting is shown to occur in contests involving minority candidates supported by minority voters; and further held that in assessing minority candidates' electoral success in judicial elections, the number of minority voters, *not* the number of minority attorneys in the jurisdiction, is the relevant statistical benchmark. The ruling below conflicts with the Eleventh Circuit's decision in *Nipper* on both points and the conflict demands resolution by this Court.

In its opinion the Eleventh Circuit holds that a proper analysis of racially polarized voting should not rely "primarily on elections involving only white candidates." 1 F.3d at 1179-80. Thus, that court said, "a consistent showing of polarization involving black and white candidates cannot be rebutted by evidence that black voters' candidates of choice sometimes win when only white candidates are running." *Id.* at 1180. When such a showing has been made, it is error to find no racial bloc voting on the ground that "'[w]hen judicial elections not involving black candidates are included in the analysis, the black candidate of choice for circuit or county judge wins the majority of the time'." *Id.*

The court below held, however, that voting was not racially polarized in the counties at issue in this case based on an analysis of election results, including primarily contests not including black candidates. For example, with respect to Harris County the Fifth Circuit discounted the district court's findings of consistent polarization in elections involving black and white candidates, and of consistent lack of electoral success of black-preferred *black* judicial candidates. It found, instead, that black voters are able to elect their preferred candidates in 52.4% of the election contests, when elections not involving black candidates are included, App. at 99a, and made a finding that voting is not racially polarized based on this "willingness of white voters to support black Republican candidates" not preferred by the black voters, and the consistent success of black-preferred white or Hispanic judicial candidates. App. at 102a.

The approach flatly contradicts the more realistic appreciation of electoral realities of the Eleventh Circuit:

> In sum, given the pervasive polarization in the elections involving black and white candidates, we hold that the district court erred in relying on elections involving only white candidates. Under these circumstances, evidence that black voters are sometimes able to elect candidates of choice in white only elections was an insufficient basis to find against appellants on the issue of racial polarization.

Nipper v. Smith, 1 F.3d at 1180.

The ruling below also conflicts with the Eleventh Circuit's decision in *Nipper* as to the proper method for assessing minority electoral success in the challenged jurisdiction. The Eleventh Circuit in *Nipper* held that the

district court had erred in appraising minority electoral success in obtaining representation on the judiciary based on a comparison of the number of black judges to the low number of black attorneys eligible for judgeships. Instead, the Eleventh Circuit found that "the appropriate comparison is the percentage of black citizens or black voters, not the percentage of black lawyers." 1 F.3d at 1181, n. 13.

The court below here, however, analyzed minority electoral success in the challenged counties in a manner that precisely mirrored the *Nipper* district court's reasoning that was rejected by the Eleventh Circuit. The Fifth Circuit disregarded the district court's findings in this case concerning, for example Texas' historical discrimination against African Americans and Hispanics in education and employment, and its conclusion that the pool of eligible lawyers was small because of that discrimination. (App. 533a; 536a-537a.) Rather, the court of appeals concluded that minority electoral success should be assessed based on the number of eligible minority attorneys.[14]

---

[14]In making this comparison, the Fifth Circuit did not discuss the evidence regarding the number of eligible attorneys in each of the nine counties at issue, but instead made the blanket statement that "[t]he cold reality is that few minority citizens can run for and be elected to judicial office." App. at 63a. The court made no reference to the evidence in the record that in 1988 in Harris County, for example, there were over 500 African American attorneys were eligible to serve as district judges, and African American candidates ran in 17 contested district judge general elections between 1980 and 1988.

The conflicts between the Fifth and Eleventh Circuits concerning the method of establishing the *Gingles* threshold factor of racial bloc voting, and concerning the method of evaluating minority electoral success are of paramount significance, since most of the States in which litigation under the Voting Rights Act of 1965 has been brought are within these two federal judicial divisions. This Court should, accordingly, grant certiorari to resolve those conflicts.

III.

THE COURT OF APPEALS' HOLDING THAT THE DEFENDANT OFFICIALS OF THE STATE OF TEXAS COULD NOT ENTER INTO A PROPOSED SETTLEMENT OF THIS CASE PRESENTS AN IMPORTANT ISSUE THAT SHOULD BE RESOLVED BY THIS COURT

As set out *supra* in the Statement of the Case the plaintiffs and the official state defendants negotiated a proposed settlement of this litigation. The settlement was agreed to by the Attorney General of the State of Texas, a named defendant, in his capacity as counsel for the state officials, the Governor, Lieutenant Governor and Secretary of State, and was approved by majority votes of both houses of the legislature of Texas. The parties to the settlement filed a motion with the Fifth Circuit seeking a remand to the district court for a hearing at which any objections, including those of intervenors, could be heard. The Court of Appeals, however, refused to remand the case, but instead decided the merits of the case.

As this Court has repeatedly held, the settlement of cases is highly favored. *See, e.g., Evans v. Jeff D.*, 475 U.S.

717, 732-33 (1986); *Marek v. Chesny*, 473 U.S. 1, 10 (1985). Thus, an intervenor cannot stop the original parties from entering into a settlement of the claims between them. As *Local Number 93, International Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 528-29 (1986), held:

> It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearing on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.[15]

Moreover, it is clear that a public agency has the power to settle a case for relief that goes beyond that which the Constitution or laws might require. *Rufo v. Inmates of Suffolk Jail*, 502 U.S. ___, 116 L.Ed.2d 867, 889 (1992). *See also*, *Wise v. Lipscomb*, 437 U.S. 535, 548 (1978)(Powell, J. concurring).

The decision below conflicts with the principles of all of these cases. Moreover, it raises troubling questions concerning the appropriateness of a federal court's overruling the decision of state officials to compromise litigation and substituting its judgment as to the best interests of a state. In the present case, the Attorney General, the Governor, the Lieutenant Governor, the Secretary of State, and a majority of both houses of the

---

[15]Here, the parties sought a remand so that the intervenors and any one else could voice objections at a hearing before the district court.

Texas Legislature made clear their wish to compromise the action and to modify the method of election of state court judges. It is also clear that they had valid reasons to do so, in light of the decision of the district court, the holding of this Court in *HLA v. Attorney General*, and the resultant substantial possibility that there was a violation of the Voting Rights Act. Nevertheless, the Court of Appeals overruled the considered judgment of those most suited to deciding the interests of the State of Texas on the most tenuous grounds.[16]

To petitioners' knowledge, the decision below is an unprecedented departure from the accepted and usual course of judicial proceedings. Moreover, the Fifth Circuit's approach could undermine the mutually acceptable settlement of hundreds of constitutional and statutory lawsuits. Therefore, the decision below calls for an exercise of this Court's power of supervision over the lower federal courts.

---

[16]As the dissents below noted, there is a serious question whether any of the parties blocking the settlement had standing to do so. Justice Phillips was a nominal defendant, one of many joined in his official capacity in order to satisfy *Ex Parte Young*, 209 U.S. 123 (1908). Judges Entz and Wood were allowed to intervene in their individual capacities only in order to protect their interest in retaining the judicial offices they held. The proposed settlement would not affect the manner in which their offices were elected. The proposition that they could block, rather than simply voice objections to, a settlement entered into by state officials because they are voters raises the specter of any citizen being able to block any settlement desired by public officials.

IV.
THE FIFTH CIRCUIT FAILED TO ADHERE TO THIS COURT'S MANDATE WHEN IT DID NOT REMAND THE CASE TO THE DISTRICT COURT FOR A DETERMINATION OF THE FACTUAL ISSUE OF THE WEIGHT TO BE GIVEN TO THE STATE'S INTEREST IN AT-LARGE ELECTION OF TRIAL COURT JUDGES.

The court below held that the interest of the State of Texas in maintaining the present at-large electoral system must be weighed against proven vote dilution to assess whether such dilution creates Section 2 liability. The court further held that the substantiality of Texas' interest under Section 2 is a question of law reviewable *de novo*, and not a question of fact. App. at 76a. In so holding, the Fifth Circuit failed to adhere to this Court's express holding in *Houston Lawyers Association* that the state's interest in the maintenance of the at-large system is *one factor* to be considered under the "*totality of the circumstances*," and is therefore a question of fact to be determined by the trial court. The Fifth Circuit, therefore, erred by conducting a fact-finding expedition and failing to adhere to this Court's mandate to remand this case to the district court in the first instance for a factual determination regarding the sufficiency of the state's interest in "linkage" in the overall "totality of the circumstances" calculation.

As explicitly noted by this Court, the "State's interest in maintaining an at-large, district-wide electoral scheme . . . is merely one factor to be considered in evaluating the 'totality of the circumstances' . . . ." *HLA*, 115 L.Ed. 2d at 387. As mentioned above, application of the "totality of the circumstances" tests requires a court to make

factual findings to determine whether minority voting strength is minimized or cancelled out. *See Thornburg v. Gingles*, 478 U.S. at 77-80. The appropriate fact finder in this case is the district court and not the court of appeals.

The Fifth Circuit relied principally on the proposition that Texas links the electoral and jurisdictional bases of trial court judges to hold that the state has a substantial interest in maintaining the present at-large electoral system. App. at 70a. However, at trial the state only perfunctorily touched on the linkage interest in two isolated references in the testimony of two witnesses, Chief Justice Thomas Phillips and Dr. Anthony Champagne, a political scientist.[17] Since the state did not prove at the trial level that linkage is, in fact, a Texas state policy, or, indeed, that the electoral and jurisdictional bases are indeed linked,[18] it was error for

---

[17] Chief Justice Phillips testified: "in my opinion, the district judge should not be responsible to the voters over an area that is smaller than that area in which the district judge exercises primary jurisdiction." TR at 5-78 (emphasis added). Similar testimony was presented by Dr. Champagne. *See* TR. 4-141-144. At trial, the state offered three reasons to support its interest in using the challenged election system: "1) judges elected from smaller districts would be more susceptible to undue influence by organized crime; 2) changes in the current system would result in costly administrative changes for District Clerks' offices; and 3) the system of specialized courts in some counties would disenfranchise all voters' right to elect judges with jurisdiction over some matters." App. at 537a.

[18] In fact, as Judge King demonstrated in her dissent and in her opinion for the panel below, no such linkage exists, since it is clear that under Texas law trial court judges are elected from counties but have state-wide jurisdiction. *Nipper v. U-*

the Fifth Circuit to act as the trier of fact and determine that there is linkage of the electoral and jurisdictional bases for trial judges, and to determine that any such linkage provides the state with a substantial interest in maintaining the present at-large electoral system.

The *en banc* court states that "*under the totality of the circumstances*, . . . breaking the link between the electoral base and the jurisdiction . . . would perversely lessen minority influence on the conduct of most litigation." (App. at 78a)(Emphasis added.) The court simply creates this finding out of thin air, as no evidence was offered by the State of Texas below to prove that any purported linkage preserves *minority influence*.

In examining the *en banc* opinion, it is clear that the Fifth Circuit engaged in a fact finding mission, thereby committing error by failing to adhere to this Court's mandate to remand this case in the first instance to the district court to develop a factual record to consider whether Texas indeed had any interest in "linkage" under the totality of the circumstances.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and reverse the decision below.

Haul Co., 516 S.W.2d 467, 470 (Tex. Civ. App. 1974). *See*, App. at 174a-176a; 269a-275a. *See also*, McDuff, *Judicial Elections and the Voting Rights Act*, 38 LOY. L. REV. 931, 956-57 (1993).

Respectfully submitted,

ELAINE R. JONES
DIRECTOR-COUNSEL
THEODORE M. SHAW
NORMAN J. CHACHKIN
*CHARLES STEPHEN RALSTON
GAILON W. MCGOWEN, JR.
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street
Sixteenth Floor
New York, N.Y. 10013
(212) 219-1900

SHERRILYN A. IFILL
University of Maryland
School of Law
500 W. Baltimore
Baltimore, MD 21201
(410) 706-8391

E. BRICE CUNNINGHAM
777 S. R.L. Thornton Frwy.
Suite 121
Dallas, TX 75203
(214) 428-3793

GABRIELLE K. MCDONALD
Walker & Satterthwaite
7800 N. Mopac
Suite 215
Austin, Texas 78759
(512) 346-6801

WILLIAM L. GARRETT
BRENDA HULL THOMPSON
8300 Douglas, Suite 800
Dallas, TX 75225
(214) 369-1952

ROLANDO L. RIOS
Milam Building, Suite 1024
115 E. Travis Street
San Antonio, TX 78205
(512) 222-2102

EDWARD B. CLOUTMAN, III
Mullinax, Wells, Baab
& Cloutman, P.C.
3301 Elm St.
Dallas, TX 75226
(214) 939-9222

*Counsel of Record

Attorneys for Petitioners